IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA PACIFIC RAILWAY and TERMINAL COMPANY, a corporation,
Appellant,

vs.

THE COPPER RIVER & NORTHWESTERN RAILWAY COMPANY, a corporation, KATALLA COMPANY, a corporation, and M. K. RODGERS,
Appellees.

No. 1491

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, DIVISION No. 1

Brief of Appellees

W. H. BOGLE,
CHARLES P. SPOONER,
WINN & BURTON,
Attorneys for Appellees.

The I... Second and ... Streets, Seattle

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA PACIFIC RAILWAY and TERMINAL COMPANY, a corporation, *Appellant*, *vs.* THE COPPER RIVER & NORTHWESTERN RAILWAY COMPANY, a corporation, KATALLA COMPANY, a corporation, and M. K. RODGERS, *Appellees.*	No. 1491

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, DIVISION No. 1

Brief of Appellees

W. H. BOGLE,
CHARLES P. SPOONER,
WINN & BURTON,
Attorneys for Appellees.

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA PACIFIC RAILWAY and TERMINAL COMPANY, a corporation, *Appellant*, *vs.* THE COPPER RIVER & NORTHWESTERN RAILWAY COMPANY, a corporation, KATALLA COMPANY, a corporation, and M. K. RODGERS, *Appellees.*	No. 1491

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, DIVISION No. 1

Brief of Appellees

STATEMENT OF THE CASE.

The appellant, plaintiff below, filed its original Bill of Complaint on the 9th day of May, 1907, whereby it alleged ownership of a certain tract of ground described in the pleadings and designated terminal tract No. 1 B, situated near Katalla, Alaska, and alleged further that this tract had been acquired by it for a railway terminal under act of May 14, 1898, granting rights of way to railroad companies over public land in Alaska, and also granting right to take public land for station and terminal purposes.

The bill further alleged that the defendants were threatening to construct a railroad across the terminal tract against the protest of plaintiff. They prayed for an injunction *pendente lite* restraining the defendants from entering upon said terminal tract No. 1 B, and from erecting any structures for railroad purposes thereon; (2) and on final hearing that the plaintiff be adjudged to be the owner of said tract and defendants perpetually enjoined from encroaching thereon.

The defendants were cited to appear at Juneau on June 5th, 1907, and show cause why an injunction *pendente lite* should not be issued as prayed for in the complaint. Affidavits were procured by defendants responsive to the issues tendered by said original bill of complaint, and the defendants by their attorneys, appeared at Juneau on the date set, prepared to answer the show cause order. On June 5th, the plaintiff filed an amended complaint in which in addition to the claim of ownership of terminal tract No. 1 B, it further set up its ownership of a right of way of 200 feet in width across said terminal tract No. 1 B, and broadened its prayer by seeking an injunction prohibiting the defendants from crossing said right of way, as well as from crossing said terminal tract No. 1 B. Answer was filed and upon the hearing the court below entered its decree refusing the application for an injunction *pendente lite*. Plaintiff has appealed from that judgment.

The plaintiff claims title both to the right of way and to the terminal grounds solely under the act of May 14th, 1898. Plaintiff was originally incorporated under the laws of the State of Washington in May, 1905. A certified copy of its articles of incorporation was filed in the office of the Secretary of the District of Alaska on the 17th day of May, 1905 (record, page 466). A certified copy of its articles of incorporation was also filed, or tendered for filing, with the Secretary of the Interior. That office, however, rejected the articles on the ground that they did not comply with the requirements of the act of congress and refused to permit them to be filed. The plaintiff acquiesced in this ruling, and afterwards executed amended articles of incorporation which were filed in the office of the Secretary of the State of Washington on February 24, 1906. A certified copy of these amended articles was filed in the office of the Secretary of the Interior and accepted by that office for filing on the ..... day of April, 1906. No copy of these amended articles of incorporation of the plaintiff company was filed in the office of the Secretary of the District of Alaska until the 7th day of June, 1907, after this suit was brought and during its hearing.

Katalla is within the limits of the Third Judicial District of Alaska and the office of the clerk of the court of that district is at Valdez. The record does not disclose that these amended articles were ever filed with the clerk of the court at Valdez, the district within which

the company was purporting to do business. These amended articles, however, were filed in the office of the clerk of the District Court of the First District of Alaska at Juneau.

The plaintiff filed maps of a preliminary survey of a right of way through the land in controversy on the ..... day of ....., 19..... It also filed in the local land office at Juneau a map of the definite location of its right of way through these lands on the ..... day of ....., 190... These latter maps were forwarded by the local office to the land department and on the 18th of March, 1907, were endorsed: "Approved, subject to all valid existing rights. James R. Garfield, Secretary."

The maps were retained by the land departemnt without any notation upon its records until the 28th of March, 1907, when it was returned to the local land office at Juneau with a letter from the commissioner directing the register to return the maps to the company for certain corrections pointed out in the letter, and after the maps should have been corrected and returned to the local office, that office was instructed to return the same to the commissioner for further examination (Record, page ....).

The register accordingly delivered the maps to the plaintiff, together with the instructions contained in the commissioner's letter, and the company, after making such corrections as it deemed necessary, returned the

map to the local office at Juneau on the ..... day of ....., 1907, after the commencement of this action. By the instructions of the plaintiff the local land office retained the maps until after the hearing of this case in the court below. They have never been returned to the commissioner of the general land office for the further examination specified in his letter of March 28, 1907.

The plaintiff company filed its maps of terminal tract No. 1 B, together with its map of a certain other tract designated terminal tract No. 1 A, with the land department at Washington on the ..... day of....., 190..... The commissioner returned these maps to the plaintiff, noting certain objections to terminal tract No. 1 A, which he required to be corrected. After certain corrections were made, both of the maps, that covering terminal tract No. 1 B, as well as that covering terminal tract No. 1 A, were returned to the general land office on the ..... day of December, 1906. No action has ever been taken by the department upon these maps of the terminal grounds. The application of the plaintiff for this terminal tract No. 1 B is still pending before the department.

The defendant, The Copper River & Northwestern Railway Company, claims right and title to a right of way across the tract designated terminal tract No. 1 B, both under the act of May 14, 1898, and by purchase from a prior possessory claimant. In November, 1901,

W. A. Abernathy, M. W. Bruner and others located two certain oil placer claims, called respectively "Oil King" and "Standard Oil." It is admitted that all of terminal tract No. 1 B, including the right of way claimed by plaintiff and in controversy in this case, is within the exterior boundaries of these two oil placer claims. The record shows that these claims were located and staked and the proper location notice filed in the proper office in that district and recorded in November, 1901. The Alaska Petroleum & Coal Company subsequently purchased both of these claims.

In the summer of 1906, the defendant, M. K. Rodgers, acting for the Copper River & Northwestern Railway Co. made a verbal contract with the Alaska Petroleum & Coal Co. for a right of way 200 feet in width across these two mineral claims, and on the 23rd of March, 1907, this oral agreement was consummated by a deed from the Petroleum & Coal Company to the Copper River & Northwestern Railway Company to such right of way (Record, pages .....).

The testimony of the appellees tends to show both the discovery and the annual assessment work upon these claims down to the date of the trial. Certain testimony introduced by the appellant tends to show both the lack of discovery and a lack of assessment work. The appellant has at all times ignored the rights of the mineral claimants. In the certificates attached by

appellant to the maps of its terminal grounds and right of way filed in the interior department there is no reference made to these existing claims.

The defendant, The Copper River & Northwestern Railway Company, a corporation, organized under the laws of the State of Nevada, in its original articles of incorporation named Valdez as the terminus of its main line and authorized the company to build such branch lines as may be necessary. These articles were filed with the Secretary of the District of Alaska and in the office of the District Court at Valdez. Subsequently it amended its articles, but the record in this case does not disclose the date of these amended articles, or the date they were filed either with the Secretary of the Interior, or the clerk of the District Court at Valdez. The amended articles had not been filed with the Secretary of the District of Alaska at the time of the trial of this case.

The defendant company filed the maps of its preliminary survey for its right of way from Palm Point to and across the land in controversy on the ..... day of ....., 190...., and the same were accepted for filing by the Secretary of the Interior on the 26th day of January, 1907. It filed its maps of definite location of its line of railroad from Palm Point to and across these lands with the local land office at Juneau on the 5th day of March, 1907. These maps were transmitted by the local office of Juneau to the land department by mail

on the ..... day of ....., 1907, but were for some reason delayed or mislaid in the mails and did not reach the commissioner of the general land office until June ....., 1907 (Record, page .....).

The defendant, Copper River & Northwestern Railway Company, is building its road from Palm Point on Controller Bay, northerly and northeasterly up the Copper River Valley. It is also building a branch line from Palm Point easterly or southeasterly up Bering River to the coal fields. At Palm Point it is building a break-water extending out into the ocean about 4000 feet, and its slips, bunkers and wharfs are being constructed along this break-water.

Palm Point is about two miles south of the land designated as terminal tract No. 1 B. This tract extends from the shore back a distance of 1550 feet. From the shore line back a distance of approximately 800 feet the ground is low and level, but rises precipitously from that point easterly.

The particular topography of this ground can be determined more intelligently from the maps which are exhibits in this case.

The line of road the defendant company has surveyed from Palm Point through this terminal tract and up the Copper River Valley for a distance of something over 100 miles has a maximum grade of 3-10 of one per

cent, and a maximum curvature of about six degrees. In the court below the appellant contended that the defendant could obtain a feasible and practicable route for its railroad by building around the terminal tract on the east and coming back into its proposed route at a point north of this tract. The testimony shows that such a line would have a grade of at least one per cent and curvature of ten to twelve degrees, and would necessarily have heavy cuts through the mountains back of the terminal tract.

The testimony of Mr. Rodgers, the chief engineer of the Copper River & Northwestern Railway Company, shows that upon the line of road as surveyed and claimed by him, one locomotive can carry a train load of 18,000 tons from the copper fields to Katalla, whereas on a road built around the terminal tract, as proposed by plaintiff, the maximum load for one locomotive would be about 800 tons. He further shows that the cost of handling tonnage on the line suggested by the plaintiff around the terminal tract would be double the cost on the line as projected by the company. The cost of construction would also be much larger and the distance would be greater.

It is also shown by Mr. Rodgers that upon the projected line of the defendant company the road will be built upon embankments about six feet high, thus carrying the track above the level of the snow fall and making

it feasible for the road to operate during the entire winter. If the road was built through the hills around the terminal tract, with the heavy grades and cuts incident thereto, it would be impracticable to operate during the winter season on account of the extreme heavy snow fall filling these cuts.

It was also shown by the testimony of Mr. Rodgers that if the defendant company was compelled to build its road around the terminal tract through the hills, it would be impossible to complete the twenty-mile section thereof within the twelve months, as required by the act of May 14, 1898 (Record, page .....).

ARGUMENT.

I.

The appellant's counsel have very skilfully skipped over the imperfections in the organization of the plaintiff company, and the defects in its title to the premises in controversy, and have devoted practically their entire argument to the discussion of supposed defects in the organization and title of defendant. Inasmuch as the plaintiff is seeking relief based upon its own alleged title, we propose to devote our first attention to its claims to the premises in controversy.

1. In the first place, the plaintiff claims title to the premises in controversy by virtue of alleged com-

pliance upon its part with the provisions of the act of May 14, 1898. That act provides as follows:

"That the right of way through the lands of the United States in the District of Alaska is hereby granted to any railroad company duly organized under the laws of any state or territory, or by the Congress of the United States, which may hereafter file for record with the Secretary of the Interior a copy of its Articles of Incorporation and due proofs of its organization under the same," etc.

The Land Department of the government is charged with the duty of administering this act. Certain regulations were issued by the General Land Office on the 13th day of January, 1904, for the guidance of local officers in the administration of this law and for the information of the general public. These regulations of the Land Department have the force and effect of law.

Cosmos Exploration Co. v. Grey Eagle Co., 190 U. S. —.

Section 4 of these regulations is as follows:

"4. Any incorporated company desiring to obtain the benefits of these sections is required to file the following papers and maps:

"First. A copy of its articles of incorporation duly certified to buy the proper officer of the company under its corporate seal, or by the Secretary of the State or Territory where organized.

"Second. A copy of the State or Territorial law under which the company was organized, with the certificate of the Governor or Secretary of the State or Territory that the same is the existing law.

"Third. When said law directs that the articles of association or other papers connected with the organization be filed with any State or Territorial officer, the certificate of such officer that the same have been filed according to law, with the date of the filing thereof.

"Fourth. A certificate from the secretary of the District of Alaska showing that the company has complied with Chapter 23, title 3, act of June 6, 1900 (31 Stat. L. 528), providing a civil code for the District of Alaska."

No corporation is entitled to the benefits of this act until it has complied with these requirements.

The plaintiff company was originally organized in May, 1905, and tendered copies of its articles of incorporation for filing in the office of the Secretary of the Interior. These articles were rejected, however, upon the ground that they did not comply with the law, and were not in fact filed. The company thereupon executed amended articles of incorporation on the 23rd day of February, 1906, and a certified copy of these amended articles was filed with the Secretary of the Interior in April, 1906. These amended articles, however, were never filed with the Secretary of the District of Alaska until the 7th day of June, 1907, long after this suit was instituted. The record does not show that a copy of these amended articles has ever been filed in the office of the Clerk of the District Court of the Third Division at Valdez, Alaska. By chapter 23, title 3, act of June 6, 1900, providing a civil code for the District of Alaska, it is provided as follows:

"All corporations or joint stock companies organized under the laws of the United States or the laws of any state or territory of the United States, shall before doing business within the district file in the office of the Secretary of the District and in the office of the Clerk of the District Court for the division wherein they intend to carry on business, a duly authenticated copy of their charter or articles of incorporation," &c.

By the regulations of the Interior Department above quoted, no company can avail itself of the benefits of the act of May 14, 1898, until it has complied with these requirements of the act of June 6, 1900.

If we understand the argument of appellant's counsel correctly, they contend that under the decision in the case of *Washington & Idaho Railroad Company v. Coeur d'Alene Railroad Co.*, 160 U. S. 77, no rights can be acquired by any railroad company under the act of Congress until after such company has strictly complied with the requirements of the act. If that construction of the act and of the decision is correct, it is manifest that the plaintiff company has never been in a position to claim any benefits under said act. Under its original articles of incorporation it was not authorized to claim any benefits under this act, as held by the Secretary of the Interior. It cannot claim any benefits under its amended articles for the reason that it has never filed copies of the amended articles with either the Secretary of the District of Alaska or with the Clerk of the District Court of the district in which it is doing business. It has

never complied with Chapter 23, Title 3, act of June 6, 1900, and of course has furnished no certificate from the secretary of the District of Alaska showing compliance with said act.

2. In the second place, the record shows that the plaintiff company has never completed its organization so as to be authorized to do business under the laws of the State of Washington, in which state it was incorporated. The corporation law of the State of Washington provides that no corporation shall be authorized to commence business until the whole of its capital stock has been subscribed. Ballinger's Code, Sec. 4250. Chap. 23, Title 3, of the act of June 6, 1900, provides that every corporation before being authorized to do business in Alaska must file a financial statement conforming to the particulars mentioned in the act. With the original articles of incorporation filed by this company with the Secretary of the District of Alaska there was filed a statement as required by the act of Congress. The capital stock consisted of $2,000,000.00. The statement recites that no part of this capital stock was paid in in money. It further recites:

"The amount of capital stock paid in in any other way $2,000,000.00, paid for establishing a preliminary survey for a railroad, terminals, harbor rights, etc. Assets consisting of the preliminary survey for a railway, including harbor rights and terminals, together with the

rights, franchises and privileges incident thereto, cash value $2,000,000.00." Pages 466-9. Connected with and attached to the statement and a part thereof is an extract from the minutes of the Board of Trustees of the company under date of May 5, 1905, reciting that one Peter F. Byrne had located a tract of 60 acres on Controller Bay under the Soldiers' Additional Homestead Law, and had caused to be located the right of way for a railroad for a distance of fourteen miles, and had caused the preliminary survey thereof to be made and filed in the office of the Surveyor General of the district, and that said Byrne had given to M. W. Bruner an option on this land and surveys, and that the said Bruner had offered this option to the company for a valuable consideration, and that the company had accepted the offer. (Page 454.) It will thus seem that there was no subscription for the capital stock of $2,000,000.00 by anyone, but that the entire capital stock was issued in consideration of the transfer to the company of the preliminary survey for a line of railroad fourteen miles in length (which under the act of Congress of May 14, 1898, was not assignable, and to which, of course, the company acquired no rights by the assignment), and the assignment to the company of the survey for a Soldiers' Additional Homestead. This homestead, by the way, as shown upon the trial of the case, was simply a survey, and was relinquished by Byrne at the instigation of Mr. Morri-

son (Record, p. —). The company acquired no rights whatever under it. This extract from the minutes, together with the financial statement of the company filed with the secretary of the district shows that there was no subscription for the capital stock at all, and that the entire capital stock was issued to Bruner, or some other person, in consideration of the assignment to the company of two absolutely worthless assets, to-wit: the preliminary survey of a line of railroad, which under the statute was not assignable, and the survey for a homestead which was relinquished to the government. We think, therefore, that the record shows in this case that this company at the time of its various transactions in Alaska was not authorized to carry on business either in Alaska or elsewhere.

3. In the third place, we maintain that the lands in controversy were not public lands open to entry by a railroad company for either a right of way or station grounds under the act of May 14, 1898. The record shows that in November, 1901, the "Standard Oil" and "Oil King" mineral claims were located and the location claims filed and recorded as required by law in the office of the recorder for that district. It is admitted that all of the lands in controversy are within the exterior boundaries of these claims. The act of Congress grants the right of way only over public lands. By Section 4 of the act it is provided, that where the com-

pany finds it necessary to pass over private lands or possessory claims it should have the right of condemnation. It was not the purpose of Congress to grant a right of way to a railroad company over any lands owned by private individuals nor to grant a right of way over lands to which private individuals held possessory claims. In this respect the act of May 14, 1898, relating to Alaska is identical with the act of March 3, 1875, granting rights of way to railroads over public lands in the United States. What constitutes a "claim" within the meaning of these railway grant acts has been before the courts many times, and it is now settled that any land as to which the public records show the existence of a claim uncancelled, whether homestead, pre-emption or mineral, is excluded from the grant to the railroad. In the case of *N. P. Ry. Co. v. Sanders,* 49 Fed. 129, the question was decided by this court. In that case it was disclosed that at the time of the filing of the map of definite location by the N. P. Ry. Co., the public records showed the existence of a mineral claim covering the land involved in the suit. In the pleadings in that case it was shown that while the public records showed the existence of this claim, it was admitted that in fact the land contained no valuable mineral and was not chiefly valuable for its minerals. This court held, however, that the question of whether land was public land or not must be determined by the public records, and that the

existence upon the public records of the recorded claim to these lands as mineral, uncancelled, constituted such a claim to the lands as excepted them from the grant to the N. P. Ry. Co. The court said:

"It was for the time being actually segregated from the body of the public domain by a claim apparently genuine and lawful, appearing of record and recognized by the officers of the government; and as to the actual validity thereof dependent only upon issues of fact to be thereafter determined by competent authorities. By an unbroken line of decisions of the Supreme Court from the case of *Wilcox vs. Jackson,* 3 Peters, 498, to the case of *St. Paul, etc., v. N. P. R. Co.,* 139 U. S. 1, the title to lands so affected does not pass by a grant of public land."

This case was affirmed by the Supreme Court on appeal, *N. P. R. Co. v. Sanders,* 166 U. S. 620.

See, also—

Hastings &c. v. Whitney, 132 U. S. 357.

Whitney v. Taylor, 158 U. S. 85.

Washington &c. Co. v. Osborn, 160 U. S. 103.

N. P. R. Co. v. Colburn, 164 U. S. 383.

Tarpey v. Madsen, 178 U. S. 215.

In the course of the opinion by the Supreme Court in the Sanders case they quoted from the Dunmeyer case as follows:

"It is not conceivable that Congress intended to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligations, least of all is it to be supposed that it intended to raise up, in antagonism to

all the actual settlers on the soil, whom it had invited to its occupation, this great corporation, with an interest to defeat their claims, and to come between them and the government as to the performance of their obligations."

The court further quoted from the same case as follows:

"In the case before us a claim was made and filed in the land office, and there recognized, before the line of the company's road was located. That claim was an existing one of public record in favor of Miller when the map of plaintiff in error was filed. In the language of the act of Congress this homestead claim had attached to the land, and it therefore did not pass by the grant."

The court also quoted with approval the following from the case of *Whitney v. Taylor*:

"Although these cases are none of them exactly like the one before us, yet the principle to be deduced from them is that when on the records of the local land office there is an existing claim on the part of an individual under the homestead or pre-emption law, which has been recognized by the officers of the government and has not been cancelled or set aside, the tract in respect to which that claim is existing is excepted from the operation of a railroad land grant containing the ordinary excepting clauses, and this notwithstanding such claim may not be enforceable by the claimant, and is subject to cancellation by the government at its own suggestion, or upon the application of other parties. It was not the intention of Congress to open a controversy between the claimant and the railroad company as to the validity of the former's claim. It was enough that the claim existed, and the question of its validity was a matter to be settled between the government and the claimant, in respect to which the railroad company was not permitted to be heard."

The court applied these principles to their full extent to a mining claim in the Sanders case.

In the case of *N. P. R. Co. v. DeLacey,* 174 U. S. 622, the court, after quoting from the Dunmeyer case, stated:

"We would say that if there were at the time of the filing of the map of definite location an actual existing claim, even though it might turn out to be wholly unfounded, the land thus claimed would not pass by the grant."

In *Tarpey v. Madsen, supra,* the court again emphasizes the rule that a claim uncancelled of record operated to exclude the land covered by it from public railroad grants, although the claim in fact may have been invalid.

In the case of *Washington &c. Co. vs. Osborn,* 160 U. S. 103, these principles are adopted and applied by the court in construing the act of March 3, 1875, which, as we have before stated, is identical in its terms with the act relating to Alaska in this respect.

The fact that these lands in controversy were at the time the plaintiff company made its surveys and filed its map of definite location covered by outstanding mineral claims, of record and uncancelled, is admitted. Plaintiff's counsel has attacked these claims, not upon the question of their record validity, but upon the alleged ground that there was no discovery of oil upon

the claims, and upon the further ground that the annual assessment labor had not been performed thereon. We earnestly insist that inasmuch as these claims had been accepted by the government officials and filed and recorded upon the public records, and were uncancelled, that that fact alone constituted them "claims" or possessory claims within the meaning of the act of Congress and excepted them from the grant to the complainant company as fully as if they had been excepted by specific description in the grant itself, and that the railroad company cannot be heard to raise the question as to whether these mineral claimants have performed the obligations existing between them and the government with respect to these claims. The government has not undertaken to grant to this complainant lands held under individual claims, but has granted it only such public domain as was shown by its records to be free from the possessory claims of other citizens.

If, however, the court should hold that it was competent in this case to go into the question of discovery or non-discovery, and also into the question whether the annual assessment labor had been performed, we maintain that the testimony in the record shows full performance of both these obligations. The location claims as filed and recorded recite that oil was discovered on these claims on November 21, 1901. Mr. Clark Davis, the president of the Alaska Petroleum & Coal

Company, the present owner of these claims, in his affidavit (Record, p. 290), states that before purchasing the claims for his company he had conversation with the original locators and was informed by each of them that discovery of petroleum was made upon each of said claims before they were located. He further stated that he had himself observed the presence of oil upon each of the claims, and that oil exuded from the surface of said claims in sufficient quantity and of such a quality as to justify a reasonable man in the expenditure of the money necessary in the further development of the claims.

Mr. M. K. Rodgers (Record, p. 68), testified that he found gas at a point within 100 feet of these claims in such quantity that he could light it with a match and it burned for some considerable time. He further testified that he was familiar with the oil regions of Pennsylvania and with the geology of that country, and had carefully examined the surface indications around Katalla and to some extent the geological formation, and that he verily believed that this was an oil field. The good faith of the Alaska Petroleum & Coal Company in its claim of these oil lands is shown by the fact that they have expended a great deal of money in acquiring them, and have invested some twenty to twenty-five thousand dollars in implements for boring wells, and are diligently engaged in sinking wells in this immediate vicinity, and

have spent from twenty to twenty-five thousand dollars in that work.

The principal witness on behalf of plaintiff with respect to the non-discovery of oil on these claims was Dr. M. W. Bruner, who is one of the original locators of the claim. He is also the promoter of the plaintiff company and the man to whom its entire capital stock was issued for the consideration of the transfer of a preliminary survey for a homestead and section of road. He is also the same man who in 1904 sold his interest in these particular claims to the Alaska Petroleum & Coal Company, and at the time made an affidavit to the effect that his title to the claims was full and complete, and recited that he made that affidavit as an inducement to the Petroleum & Coal Company to purchase the property from him. If, as he stated in the affidavit made in this case, he knew at that time there had never been any discovery of oil on these claims, and that the lands were in fact non-mineral, and that the annual assessment work had not been performed, he perpetrated an outrageous fraud upon the Alaska Petroleum & Coal Company, and supported it by an affidavit which comes perilously near perjury.

We think the evidence in the record is also sufficient to show that the annual labor has been performed with respect to these claims. Both Mr. Davis and Mr.

Harriman state specifically that the assessment work has been performed each year. Mr. Rodgers also testified that there had been a roadway built across the claims at very considerable expense prior to the time he went there in the summer of 1906, and that it was commonly understood in the community that this roadway was built for the Alaska Petroleum & Coal Company (p. 65-7 of the Record). Rodgers also testifies to extensive work on these or adjoining association claims (page 66-7). This is permitted as to oil claims under the act of February 12, 1903. 32 St. at L. 825. Houses were also constructed by that company on these claims (page 259). It was also shown in the affidavit of one of the witnesses for the plaintiff that some laborer was at work on these claims for some considerable time during the summer of 1905, and that he understood that the work was being performed for the Alaska Petroleum & Coal Company (page 301). The appellants' claim that the affidavits of Mr. Davis and Mr. Harriman, to the effect that the assessment work has been done annually on these claims, are too general and that they ought to have given in detail the character of the work for each year. We respectfully submit that that is not required upon a hearing of this kind. As we have stated before, this case was tried at Juneau, more than 1000 miles from any of the witnesses,—the only person interested on behalf of the defendants, or a witness upon their behalf who

was present at the trial, was Mr. M. K. Rodgers; that we had no reason to anticipate that the plaintiff would assert the invalidity of the mining claims, or dispute the performance of the annual assessment work. The affidavits that were taken on that subject were secured at Katalla, and were intended merely to show that the claims had not been abandoned or forfeited. We were also of the opinion then, as we are now, that the question of the performance or non-performance of the annual assessment labor could not properly come before the court in this case.

We therefore maintain that these mineral claims were existing, possessory claims of record at the time the plaintiff company filed its map of the definite location of the right of way of its road, and at the time it filed its map of its terminal grounds, and that by reason of the existence of these claims, the lands covered by them were excluded from the grant to the plaintiff company.

The record shows that the defendant, Copper River & Northwestern Railway Company, purchased the right of way across these lands from the Alaska Petroleum & Coal Company (see Record, p. 409). When Mr. Rodgers went to Katalla in the early summer of 1906, he made inquiry at the recorder's office as to the ownership of these lands, and ascertained that they belonged

to the Alaska Petroleum & Coal Company. After running his surveys he negotiated with that company for a right of way over these claims and they agreed to convey to his company the required right of way. This agreement was subsequently consummated by the execution of the deed in March, 1907.

The title thus acquired by the Copper River & Northwestern Railway Company was sufficient to entitle it to enter upon the right of way thus conveyed to it and construct its railroad.

It is argued by appellant's counsel in their brief that the Alaska Petroleum & Coal Company only owned a five-eights (5/8) interest in these claims, and that they could not convey a right of way therein to defendant company. We do not deem it necessary to reply at length to the argument and authorities cited by them upon this proposition. In the first place, if the defendant company is the owner of an undivided five-eights interest in this 200-foot strip across the disputed tract, that is sufficient to entitle them to possession and to the exclusive possession as against all the world except their co-tenants. The plaintiff has not connected itself in any way with these alleged co-tenants, and asserts no title under them. It is surprising to find able counsel contending that an utter stranger to the title, who is a mere trespasser, such as the plaintiff in this case, can

by injunction, exclude the owner of a five-eighths interest in the property from its possession upon the ground that the owners of the other three-eighths have an equal right of possession with the defendant.

However, they are mistaken in assuming that the Alaska Petroleum & Coal Company owned only a five-eights interest in these claims. The affidavits of both Mr. Davis and Mr. Harriman state specifically that their company owns the claims and the whole of them. It is true the defendant did not introduce the deeds from all of the locators. We did not deem it necessary to do so. The affidavits of Davis and Harriman as to ownership were in our judgment sufficient *prima facie* evidence of that fact. The abstracts and Bruner deed were introduced, not so much to show title, as to show the bad faith of Bruner in the transaction.

As we have stated above, the affidavits of both Harriman and Davis, to the effect that the Alaska Petroleum & Coal Company was the owner of these claims, were offered and received in evidence by the court below. Whether it was error of the court to receive such evidence of title upon a hearing of that kind is immaterial for the reason that no error has been assigned upon that ground. Plaintiff in its fourteenth assignment of error alleges error on the part of the court in receiving these affidavits, in so far as they related to the discovery of

oil and the performance of assessment work, but they made no objection, or at least they assigned no error, as to receipt of the affidavits as evidence of title to the property.

It is contended by appellant's counsel, however, that even conceding all that we claim as to these mineral claims, yet the plaintiff company by filing its maps and the surveys of its line acquired a right to condemn this property for railroad purposes prior to the purchase of the right of way by the defendant company from the Alaska Petroleum & Coal Company, and by a process of reasoning, which we are unable to follow, they reached the conclusion that this alleged prior right to condemn is sufficient to maintain this action. This is not an action to condemn this property. On the contrary, plaintiff distinctly disavows any purpose or intention to condemn and seeks a decree adjudging that it is at present the owner of the property and perpetually enjoining the defendant from interfering with their possession thereof. In the last analysis the position of the plaintiff seems to be that, having a right under the statute to condemn the property, it can take and hold possession against the owner without condemnation, and obtain a decree affirming its title and perpetually enjoining the owner from interfering with the possession. In other words, having the right to condemn, it omits the formality of resorting to condemnation and mak-

ing compensation to the owner, but seeks the aid of this court to confirm its title against the owner without any condemnation or compensation whatever. Of course such a contention cannot be entertained. In the case of *Washington & Idaho Railroad Company v. Osborn,* 160 U. S. 103, the railroad claimed the right to construct its road over the disputed premises under the act of March 3, 1875. Osborn held a possessory claim to the property at the time the railroad filed its maps. The company in that case, instead of condemning, asserted a superior claim to the land to that of Osborn and brought its bill seeking to establish its title and to enjoin Osborn from interfering with the construction of the road. The Supreme Court, while recognizing the right of the railroad company to acquire a right of way over this possessory claim by condemnation, repudiated the notion that it could construct its road thereon without resorting to condemnation, and therefore dismissed the bill.

We, of course, do not dispute the principles laid down in *Sioux City etc. Co. vs. Chicago etc. Co.,* 27 Fed. 770, cited by plaintiff. Where a railroad company has by proper corporate action adopted a certain right of way and by proper resolution has directed its officers to acquire the right of way by purchase or condemnation and follows these acts with reasonable diligence by proper steps to acquire the right of way, its right to

acquire the right of way and to use the property when acquired for railroad purposes as against another corporation seeking to devote the property to a public use will relate back to the time of its corporate action and surveys. But the right thus acquired is not a vested interest in the property, nor a right to the possession thereof. It acquires no interest whatever in the property until after it has either purchased or condemned from the true owner. It is perfectly manifest that the principle invoked has no sort of application to the facts in this case, and cannot be made the basis for granting any of the relief sought by the plaintiff in its amended bill herein. If the complainant should hereafter see fit to institute condemnation proceedings as to this disputed ground, the question of priority as between the plaintiff company and the defendant company will be determined in that case. We apprehend that the plaintiff will find great difficulty in producing authorities sustaining its claim to a priority when, as appears to be the facts in this case, it has not contemplated a condemnation against the owner, but in all of the corporate action heretofore taken has contemplated the taking of the property against the consent of and without compensation to the possessory claimant or its grantees, and without previously filing its amended articles in the proper offices in Alaska. As to the right of way, we also suggest that any decree of condemnation which should

be brought by the plaintiff against the defendant company would reserve the right to defendant company to cross with its own tracks at grade in accordance with the provisions of Section 3 of the act of May 14, 1898. As to the alleged terminal grounds, we apprehend that no court would permit the condemnation for this purpose until the plaintiff had made a proper showing of necessity. The testimony in this case tends very strongly to show that the plaintiff would not be able to prove such necessity for this particular tract as would justify a condemnation against the defendant company, for the reason that there is ample ground immediately northeast of defendant's right of way across this tract for terminal grounds, and plenty of room along the plaintiff's main line north and west of defendant's crossing for freight yards. It may also be doubted whether Section 4 of the act gives the right of condemnation for terminal tracts, inasmuch as the act itself grants the right of condemnation of "the right of way" only across possessory claims. However, none of these questions are involved in this case, for the reason that the plaintiff is here seeking to take the whole of the property without condemnation, and nowhere in its complaint alleges any facts upon which the question of the right to condemn could be determined.

II.

Aside from the questions just discussed, the appellant did not show any title, legal or equitable, to the premises in controversy. The map of definite location of the right of way of appellant was filed with the register of the land office at Juneau on the ..... day of ....., 19...., and by that official forwarded to the Secretary of the Interior. On the 18th of March, 1907, the Secretary of the Interior made the following endorsement upon said map:

"Approved, subject to all existing legal rights. James R. Garfield, Secretary."

The map was retained in the office of the Secretary of the Interior until March 28th, when it was returned by the Commissioner of the Land Office to the Register and Receiver at Juneau, Alaska, accompanied by a letter pointing out certain imperfections and discrepancies between the map and the forms thereunder. The commissioner's instructions to the local office were as follows:

"You will forward the map and field notes in duplicate to the company and request it to make the necessary corrections at as early a date as possible and return them to you, and you will forward them to this office for further examination."

See, Record, p. 285.

The map was accordingly returned to the company by the register and receiver with a copy of the commis-

sioner's instructions, and subsequently, after the commencement of this action, and on the 29th day of May, 1907, the map was again returned by the company to the local land office at Juneau. In the agreed statement of facts it is stated that the appellant company made such corrections as it deemed necessary pursuant to said letter (Record, p. 282). This map has never been returned to either the secretary or the commissioner for the further examination mentioned in the commissioner's letter of March 28.

The act of May 14, 1899, granting rights of way for railroad companies over public lands in Alaska, by Section 5, provides, that any company desiring to secure the benefits of the act shall within twelve months after filing the preliminary map of location of its road, file with the register of the land office a map and profile of at least twenty-mile section of its road as definitely fixed, and "upon approval thereof by the Secretary of the Interior, the same shall be noted upon the records of said office, and thereafter all such lands over which such right of way shall pass shall be disposed of, subject to such right of way." The regulation of the Interior Department issued January 13, 1904, pursuant to this act (Section 20, p. 17, Circular), is as follows:

"Upon the approval of the map of definite location or station plat by the Secretary of the Interior, the duplicate copy will be sent to the local officers, who will make such notations of the approval on their records

in ink as will indicate the location of the right of way as accurately as possible.''

Now the question is whether the endorsement of the Secretary of the Interior upon this map of definite location under date of March 18, 1907, the retention thereof in the General Land Office at Washington, without any notation upon the public records, the return of the map to the appellant company by the commissioner for correction, and the failure to return the maps to the land department for further examination and final approval, operated to vest the title in the appellant company to the right of way shown upon said map, assuming that the lands were public lands at that time. We insist that the approval of the Secretary of the Interior had not become effective at the time this suit was instituted, nor at the time of the trial of the case below. He had retained the right of ''further examination,'' and had not noted the withdrawal of the land upon the public records. It is not the mere approval of the map by the Secretary which operates to vest title in the applicant. The act of Congress contemplates that there shall be noted upon the public records the fact of the withdrawal of such lands from the public domain, so that the public at large will be advised of the fact that these lands have been taken up by the railroad company. The act itself provides that upon approval of the map by the Secretary of the Interior ''the same shall be noted upon

the records of said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way. The regulation of the department is drawn in consonance with this provision. In the case of *Noble vs. Company*, 147 U. S. 165, the Supreme Court held that the specific act which operates to transfer the title to public land from the United States to a railroad company under these general right of way acts, is not simply the endorsement of approval upon the map of definite location, but is the approval by the secretary and the notification of such approval to the register and receiver, and the entry by that office upon its records of the notation required by the regulations showing the lands to have been taken up by the railroad company. "Upon being satisfied of these facts, and that all the other requirements of the act had been observed, he was authorized to approve the profile of the road, *and to cause such approval to be noted upon the plats in the land office for the district where such land was located.* When this was done, the granting section of the act became operative, and vested in the railroad company a right of way through the public lands to the extent of 100 feet on each side of the central line of the road." *Noble vs. Company, supra*, p. ....

The mere endorsement of approval by the secretary is no more than the signature to a deed,—before it becomes effective to transfer the title, the approval must

be noted upon the public records, which act is equivalent to the delivery of the deed. These acts have not been done in the present case. On the contrary, although the Secretary of the Interior endorsed his approval upon the map, he retained the map in the land office from the 18th to the 28th of the month, and then returned it to the local land office, not with instructions to note the approval upon his records, but with instructions to return the map to the company for correction, and with instructions to the local office after these corrections shall have been made and the map returned by the company, to return the map to the Interior Department for further examination. The question of an effective approval of the map by the Interior Department was still *in fieri*. The "further examination" called for by the letter of the commissioner of January 28th has never been had. Whether the map was corrected in all of the particulars as required by the land department was for that department to determine. The agreed statement is to the effect that the plaintiff made such corrections as it deemed necessary under the letter from the commissioner. Whether the commissioner would consider the corrections made as complying with the requirements of the department is an unknown question.

With respect to the terminal grounds, the absence of title in the plaintiff is even clearer. The act of May 14, 1898, treats the right of way and grounds for station

buildings, etc., as distinct things. The regulations of the Interior Department require maps of the right of way to be filed and separate and distinct maps of station and terminal grounds to be filed. The map of the right of way is required to be on a scale of 2000 feet to the inch. Plats of station and terminal grounds are required to be on a scale of 400 feet to the inch (Regulation 16 of Circular from Interior Department). Separate forms for the certificates and proofs required by the Interior Department are prescribed in case of terminal station grounds from those required in case of right of way. The plaintiff company filed separate plats of its right of way and of its terminal grounds. It is conceded that the plat of terminal tract No. 1 B has never been approved by the Secretary of the Interior. Appellant contended in the court below that the approval of May 18, 1907, by the Secretary of the Interior of the map of the right of way was also an approval of the map of the terminal tract No. 1 B. That, however, is clearly an untenable position, and we do not understand that they are seriously endeavoring to maintain that position in this court. The tracing of the terminal tract on the right of way map is merely to show its position. Neither the field notes nor the certificate on that map refer to the terminal tract; nor are the dimensions, courses or distances of its exterior lines given. Nor does that map contain the certificates required by the regulations to be attached to station and terminal maps.

The testimony in the record, p. ....., shows distinctly that the Interior Department never intended the approval of the map of the right of way to be an approval of the plat of station grounds, and that these latter have never been approved. For these reasons we insist that the appellant has no such right or title to any of the lands in controversy as entitles it to enjoin these defendants in constructing a railroad thereon. The right of land for station and terminal purposes under this act cannot attach prior to the date of the approval by the Secretary of the Interior of the map of definite location, and the notation of such approval upon the public records as required by the act. In addition to our contention above set forth, that neither the map of the definite route of the right of way nor the plats of the station grounds has been finally approved by the Secretary of the Interior, we insist that the defendant, Copper River & Northwestern Railway Company, acquired a right over these lands, if they are public lands, prior to the vesting of any interest in the mineral tract for terminal purposes in the plaintiff company. The terminal map of the right of way of the Copper River & Northwestern Railway Company was filed in the office of the Secretary of the Interior on the 26th of January, 1907, and accepted for filing on that date by the secretary (See, record, p. 282). The map of definite location of the right of way of the Copper River & Northwestern Rail-

way Company across the lands in dispute was filed in the local land office at Juneau on the 5th day of March, 1907, as required by said act (See, record, p. 283). By Section 4 of the act, if the map of definite location is filed within twelve months after the filing of the preliminary map, the rights of the applicant relate back to and take effect from the date of filing of the preliminary map. Consequently, assuming that the map of definite location of the Copper River & Northwestern Railway Company will be approved in due time, its right to the right of way across these lands will date from the time of the filing of its preliminary map, to-wit: January 26, 1907.

The right of the appellant company as to these station grounds cannot antedate the 18th day of March, 1907. The act provides that the station grounds must be taken from public land "adjacent" to the right of way. In *Lillienthal vs. Railway Co.*, 56 Fed. 701, the court held that no rights to land for station grounds attached prior to the definite acquisition of the right of way, that is, the approval by the secretary of the definite map of the right of way and the performance by him of such other acts as vested title to the right of way in the company.

While the act of May 14, 1898, provides that, upon the approval of the definite map of the right of way, the

right thereby acquired to the right of way shall relate back to the date of filing the preliminary map, there is no provision applying the doctrine of relation with respect to the grounds for station and terminal purposes. Our contention, therefore, is that in any event the right of the defendant company to its right of way relates back to and takes effect from January 26, 1907, while the right of the plaintiff company to these grounds for station purposes dates, at most, from March 18, 1907.

III.

One fact brought out more clearly than any other in this case is the fact that practically all of the questions of title and priority of rights between these companies are now pending undetermined in the Land Department. As we have shown, the maps of the terminal grounds filed with the plaintiff company are still pending unapproved in that department. The map of definite location of the right of way of the plaintiff company is, we think, still pending in the Land Department. No other construction can be given to the letter of the Commissioner of the Land Office of January 28, 1907, above referred to. That map has never been returned to the commissioner for the further examination he desired to make, and no notation has been made upon any of the public records of the allowance of the entry or claim of the plaintiff company to these lands. It is still

within the power of the Land Department to reject that map and disallow the claim of the plaintiff thereunder. The preliminary map of the right of way of the defendant railroad company across these lands has been accepted by the Interior Department, but its map of definite location across the tract is still pending before the department. Under these conditions, we think this court, even if it had technical jurisdiction to do so, will not undertake to decide upon or adjudicate with respect to these titles. This precise question was decided by the Supreme Court in *Cosmos Exploration Company vs. Grey Eagle Oil Company,* 190 U. S. 301. In that case the prayer of the complaint was substantially the same as the prayer in the complaint in the case at bar. The complainant had surrendered lands within a forest reservation, and in lieu thereof had made entry upon the land in controversy and filed all of the documents required by law in the local land office, which had transmitted them to the General Land Office, but they had not been acted upon by the latter office. The defendant had previously entered the land as an oil mineral claim, but did not make any discovery of oil until after the complainant's entry and filings. Upon this state of facts the complainant alleged in his bill that the mineral location was void because there had been no discovery of oil, and that although the complainant did not have the full legal title by reason of the fact that his entry had

not been approved by the secretary, yet that he had full equitable title by reason of the fact that he had complied with all the requirements of the law and was legally entitled to approval from the secretary. The Supreme Court held that the questions involved were properly pending before the Land Department, and that the court could not entertain jurisdiction of the complaint for that reason. The court said that whether the lands were vacant, and therefore open to entry by the complainant, was a question primarily for the Land Department to decide; that whether the mineral claim was void because there had been no discovery up to the time the complainant made its filings was also a question for the Land Department to decide in the first instance:

"What might be the decision of the Land Department upon these questions in this case cannot be known, but until the various questions of law and fact have been determined by that department in favor of complainant, it cannot be said that it has a complete equitable title to the land selected. Concluding as we do that the question whether the complainant has ever made a proper selection of the land in lieu of the land relinquished has never been decided by the Land Department, but is still properly before that department, the courts cannot take jurisdiction and proceed to decide such question themselves. The government has provided a special tribunal for the decision of such a question arising out of the administration of its public land laws, and that jurisdiction cannot be taken away from it by the courts. The bill is not based upon any alleged power of the court to prevent the taking out of mineral from the land pending the decision of the Land Department upon the rights of the complainant, and the

court has not been asked by any averment in the bill or in the prayer for relief to consider that question."

Applying the principles of that decision to the present case, we have the following questions now pending before the Land Department:

(*a*) Mineral claims covering all of the lands in controversy and apparently valid and existing, being shown by the public records, were such lands open to entry and location by the railroad company for its right of way and terminal grounds as public lands under the act of May 14, 1898?

(*b*) Is it competent for the railroad company claiming such lands under the right of way act to prove the mineral claims invalid by reason of a non-discovery of oil thereon prior to the railroad company's entry?

(*c*) Is it competent for the railroad company to show the invalidity of the mineral claims by proof of the failure to do the annual assessment labor?

(*d*) If it is competent for the railroad company to assail the validity of the mineral claims upon either of the grounds above mentioned, then the questions of fact to be determined are: was there a discovery of oil on these claims, and has the annual assessment labor been performed with respect thereto?

(*e*) Has the plaintiff company complied with all the provisions of the act of May 14, 1898, with respect

to the acquisition of a right of way across the lands in controversy, and in that connection there is to be determined the question whether the endorsement of approval by the Secretary of the Interior upon plaintiff's map of definite location under date of March 18, 1907, taken in connection with the action of the Land Department in retaining said map until the 28th of March, 1907, and its return to the company for correction without any notation upon the public records, and the failure of the company to have the map returned to the Commissioner of the General Land Office for further examination, have the effect of vesting the title in the plaintiff company beyond recall by the Land Department?

(*f*) Is the approval of the plats and station grounds by the Land Department essential to vest title or right thereto in the plaintiff company?

(*g*) If so, is the plaintiff entitled to the approval of the plats and station grounds in this case? This question will involve not only the validity of the prior mineral claim upon the land, but also the question whether these grounds claimed as terminal grounds are so located as to constitute a pass, canyon or defile.

All of these questions are properly before the Land Department for decision. It is true, as stated by the Supreme Court in Grey Eagle case, *supra,* that the de-

cision of any legal question by that department will not be binding on the courts whenever the question properly arises in future litigation; but in the orderly administration of the land laws, it is necessary that these and similar questions shall first be presented to and determined by the Land Department, and the courts are not at liberty to take the determination of these questions out of the hands of the Land Department. The record shows not only that these terminal plats have never been approved, but it further shows that there is a protest against their approval now pending before the Land Department undetermined.

In Alice Placer Mine, 4 L. D. 314, and *Powell vs. Ferguson,* 23 L. D. 173, the Land Department held that whether land is mineral or non-mineral was a question to be determined by the commissioner alone; and in the Grey Eagle case, *supra,* the Supreme Court said:

"It is also for the Land Department to determine whether if the land were not known to be mineral at the time of its selection, the fact that mineral in any quantities has been found since that time will vitiate the selection."

The Land Department has also held that it will not approve filings for station or terminal grounds for railroads covering lands which, although not technically a defile, pass or canyon, yet are so located that they will cut off access by other companies to large tracts of the public domain.

In the form described by the Interior Department for the proofs to be made by the chief engineer and president of the company claiming grounds for terminal purposes (Forms 7 and 8) is included the following: "And that to the best of my knowledge and belief there is no settlement or other claim along the shore of any navigable waters upon land within eighty roads of any point of this tract, except as shown on this map."

The testimony in this case shows that these mineral claims embrace the whole of the land covered by these certificates and extend along the shore of the navigable water of the ocean at that point. This fact, which is abundantly shown in the present record, was not shown on the maps filed with the Interior Department nor in the certificate attached thereto.

The existence of these mineral claims was known to the plaintiff company. Dr. Bruner, who was both the locator of the mineral claims and the promoter and active representative of the plaintiff company, of course knew of their existence. The testimony of Mr. Rodgers shows that the claims of the Alaska Petroleum & Coal Company to these lands was a matter of common knowledge, and that that company was recognized at the office of the recorder as the owner of the ground. Now what effect the suppression of this fact and the proof submitted by the plaintiff to the Land Department will have upon its claim for the right of way and for terminal

grounds is a question to be decided by the Land Department. We confidently insist that the case of *Cosmos Exploration Company v. Grey Eagle Co., supra,* requires the affirmance of the judgment of the court below.

IV.

The record shows that the plaintiff company proposes to construct a railroad from the tide water on Controller Bay southeasterly to reach certain coal mines. The defendant, Copper River & Northwestern Railway Company, is constructing a road from a point on Controller Bay known as Palm Point, some two miles south and west of the terminus of the plaintiff company, northerly along the coast line to the valley of Martin River, and up that river to the valley of Copper River, and thence to the copper fields in Copper River Valley. It will be seen that the two roads necessarily cross at some point near the coast line, as plaintiff is building from its terminus in a general southeasterly direction, while the defendant company, commencing at a point westerly of the plaintiff company's terminus, is building in a general northeasterly direction. The record shows that both companies cross the disputed grounds on trestles about fourteen or fifteen feet above the surface. The defendant company has fixed its grade to correspond with the grade of the plaintiff company's road. It is shown by the record, and we believe is not con-

tested by appellants' counsel in their brief, that the plaintiff company will not be delayed nor interfered with in the construction of its road by the act of this defendant in crossing its right of way at grade. The plaintiff company has constructed only a small stretch of track, extending from the water line a distance of probably 200 yards and to a point just beyond the proposed crossing. The presence of the crossing line of the defendant company will not in any wise interfere with the continuation of the construction of its line by plaintiff to the full twenty miles required to be completed within the first twelve months. It is therefore manifest from this record that the plaintiff company will not suffer any appreciable loss or damage by the refusal of the injunction *pendente lite*. If it is said that the plaintiff company will be somewhat interfered with in the construction of its terminal tracks upon the terminal ground, the answer is, that these terminal tracts will not be needed by that company until after its main line has been constructed to the coal fields, by which time this case will in all human probability have been tried out on its merits.

On the other hand, the defendant, Copper River & Northwestern Railway Company, will be very greatly damaged by a temporary injunction. The landing point for steamers carrying material for the construction of this road is at Palm Point. It will be necessary to con-

struct the road from Palm Point and to carry the material by rail from day to day over the constructed line. If the defendant company should be enjoined pending this suit from constructing and operating its line across the terminal tract, this would cause a break, and add so materially to the expense of construction beyond that point as to make it financially impracticable. The delay, to say nothing of the expense, incident to carting the material around the terminal tract so as to continue construction beyond that point, would make it impossible for the defendant company to complete the twenty-mile section required by the act of Congress within twelve months from the filing of its map of definite location. The record further shows that the defendant company has a large number of employes on the ground under pay, and has all of the material for the completion of the twenty-mile section of its road either on the ground or on vessels *en route* to Catalla. An injunction, therefore, which would stop the construction by defendant of its railroad, would entail enormous loss upon the defendant, and probably result in the forfeiture of its right of way by a failure to complete the twenty-mile section within the twelve months required by the act of Congress. These are some of the considerations referred to by the court below when in his oral opinion he used the following language:

"The argument made by counsel for defendant appeals to me very strongly that the damage to defendant would be great. It is stated that the defendant has 500 or 600 men there at work. Both sides seem to be in good faith and vigorously at work. The defendant has a large number of men working and a large amount of supplies on the ground, and would be greatly damaged by an order of this court preventing them from crossing this particular point of right of way at that place, and the damage would be so out of proportion to the damage done by crossing plaintiff's ground, that it does not appeal to me as a matter of right. They have got to cross plaintiff's line somewhere to get out of their terminal, and if they go over to the high grade suggested by plaintiff, they still have to cross plaintiff's road and the same condition would confront them at that point. The mere fact of their crossing plaintiff's road established on grade does not appeal to me as being such an injury as would justify this court in granting the injunction."

Appellant's counsel vigorously assail this position of the court, not upon the facts therein stated, but upon the equitable principle applied by the court. We can readily accede to the proposition that no court, either of law or equity, should arbitrarily take one man's property and give it to another, or allow one man wrongfully to seize and use another man's property simply because the property is more valuable to the man taking it than it is to the man losing it. The cases cited by plaintiff's counsel in their brief are in the main of this character. But if counsel mean to contend that in an application for an injunction *pendente lite* between parties both of whom are claiming rights in and title to the property in controversy, and where the title of neither can be

determined satisfactorily by the court until the final hearing of the case upon proper evidence, the court cannot consider the question of the damage that would result to the complainant from the refusal of the injunction and the damage to the defendant from the granting of the injunction pending the litigation, then we most respectfully submit that their position is utterly untenable.

The general rule is stated as follows:

"On an application for an interlocutory injunction, the court will also consider the balance of convenience; in other words, it will consider whether a greater injury would be done by granting an injunction than would result from a refusal; unless, perhaps, in cases where the wrong complained of is so wanton and unprovoked in its character as properly to deprive the wrong-doer of any consideration as to its injurious consequences. The courts will require a very strong case for the granting of an injunction which will cause more injury than it will remedy, and it may be said as a general rule that an injunction will not be granted where it will be provocative of greater injury than will result from a refusal of it."

16 Am. & Eng. Ency. of Law, p. 363, and cases cited thereunder.

1 High on Inj., Secs. 11 and 13.

This rule is more particularly applicable where the right sought to be protected is doubtful.

16 Am. & Eng. Ency. of Law, p. 358.

The contention of appellant's counsel that the defendant has been a wanton wrong-doer and is therefore

entitled to no consideration is absolutely without foundation. On the contrary, the facts are, that the lands in controversy were taken up by mineral claims prior to the entry of either of the railroad companies in this field, and that these mineral claims had been of record uncontested and not adversed from that time to the present; that the defendant company as soon as it entered this field made inquiries in good faith as to the ownership of these lands, and ascertained from the public records and from common report in the community that they were not public lands but were owned by the Alaska Petroleum & Coal Company. It thereupon negotiated for and acquired a right of way over these lands, which was subsequently confirmed by a deed from the Alaska Petroleum & Coal Company. These facts entitled it to enter upon the lands and construct its railroad.

The owner of the mineral claims had been in possession of the ground for years and had constructed buildings and other improvements thereon. It permitted the defendant company, by its engineers, to enter upon the land in the summer and fall of 1906 and survey and stake off its line of road thereon, and subsequently conveyed this line to the defendant.

This mineral claimant had also suffered the plaintiff to survey and stake its line and terminal tract over these lands in 1905 and 1906. These acts, however, were

not inconsistent with the possession of the claimant. It had a right to suppose that the plaintiff contemplated taking proper legal steps to acquire the rights it needed from the owner. The possession by a company for running its surveys is never considered hostile to the rightful and continued possession of the true owner. The plaintiff company, however, ignored the mineral claimants, although having full knowledge of their existance. Bruner, one of the active managers of the plaintiff company, was also one of the locators of the mieral claims, and had sold his interest therein for a very substantial consideration, and as an inducement to the Petroleum & Coal Company to buy the claim from him had made an affidavit that his title was "full and complete." Yet afterwards, under the name of the plaintiff company, the same Bruner attempted to seize possession of the lands without the consent of the mineral claimant, and to hold them by force (Record, p. 260). The complainant company had never secured an approval by the Land Department of its claim for terminal grounds; and in the proofs it filed with its maps of terminal grounds it attempted to deceive the department as to the existence of other claims thereto. Under these circumstances the right of the defendant to maintain its possession of the property and construct its road was certainly as strong as the right of the complainant company. Whether the map of definite location of the right of way of the plaintiff

company had received the approval of the Land Department definitely and finally, so that the rights thereto vested in the railroad company, was to say the least exceedingly doubtful, and that question is still pending in the Land Department. Under these circumstances the claim of the complainant that the action of the defendant company in proceeding with the construction of its road across this ground was so wantonly unjustifiable as to deprive the defendant of any consideration at the hands of the court, is far fetched and fanciful.

Where two railroad companies survey their crossing lines across the lands of a third person, neither company having any legal title to the ground, one company is warranted in seizing the land surreptitiously—in the nighttime, or during a closed season—against the protest of the owner, and using this pretended possession as a basis, in equity, for an injunction restraining the other company from completing the construction of its road—especially when the latter company has acquired title from the owner. If this was permitted, any trespasser could plant himself over night upon the right of way of a company, while the men were away, and the next day obtain an injunction to protect his unlawful seizure and tie up the company until a final hearing could be had.

V.

It is contended by appellant that before the defendant company can cross the right of way of plaintiff company, it is necessary to bring an action to condemn the right to cross, in which case the court could fix the place and manner of crossing. This argument is based upon the assumption that the plaintiff is the legal owner of the right of way and the terminal tract. If, as we have attempted to show, the plaintiff is not such owner, then of course this argument falls to the ground.

With respect to the terminal tract, as such, we think it safe to assume that the plaintiff has not shown any right or ownership therein; its plats of the terminal grounds have never been approved by the Secretary of the Interior, and until they are approved the plaintiff has neither a legal nor an equitable property in the tracts.

If the court should find that the plaintiff is the legal owner of the right of way across these terminal grounds, then the question would be whether the defendant should be enjoined from crossing that right of way prior to a condemnation by it of such right of crossing. Section 3 of the act of May 14, 1898, provides as follows:

"That any railroad whose right of way or whose track or roadbed upon such right of way passes through any canyon, pass or defile, shall not prevent any other railroad company from the use and occupancy of said

canyon, pass or defile for the purposes of its road in common with the road first located, or the crossing of other railroads at grade."

The act further provides that in case such canyon, pass or defile is being used by any tramway or wagon road, then a railroad subsequently desiring to use the same shall not cause the disuse of such tramway or wagon road, but may change the same and reconstruct it at its own expense in the most favorable location and in as perfect a manner as the original wagon road or tramway; "Provided that such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass or defile, and that where the space is limited the United States District Court shall require the road first constructed to allow any other railroad or tramway to pass over its track or tracks through such canyon, pass or defile on such equitable basis as the said court may prescribe." The apparent meaning of the statute is that where a subsequent road desires to use the track or tracks of the other road longitudinally through a pass, canyon or defile, the terms of such user shall be fixed upon an equitable basis by the court. The act itself does not indicate that the terms upon which one railroad may cross another road are to be prescribed by the court in advance of such crossing. On the contrary, the act specifically provides that the road first constructed shall not prevent another road from crossing

its road *at grade,* the manner of crossing being thus fixed by the act itself. In the case at bar it is conceded that the defendant company is crossing the right of way claimed by the plaintiff at the grade fixed and established by the plaintiff, and in that respect is strictly complying with requirement of the statute. The crossing of the plaintiff's road is at right angles.

The case of *Denver & R. G. R. R. Co. v. Denver S. P. & P. R. Co.,* 17 Fed. 867, involved a longitudinal use of the right of way of the first road by the second road. The construction of the second road also involved an interference and hindrance to the first road for the reason that one road was constructed below the grade of and longitudinally with the other road, and the dumping of material and the snow and ice that would accumulate in winter upon the upper road would interfere with the roadbed of the lower road. There were also other complications of the same character in that case. In the case at bar there are no such features. The defendant road crosses the right of way of the plaintiff at right-angles on the grade of the plaintiff, and does not in any way interfere with the construction or operation by the plaintiff of its proposed road. Under this state of facts we have been able to find no case that construes a statute similar to this act of Congress as requiring a condemnation of the right to cross the older road. The grant contained in the act specifically provides that a

subsequent road shall have the right to cross the right of way so granted at the grade filed by the grantee. This is a burden upon the right of way first granted and subject to which the plaintiff accepted its grant. It would seem clear that under such circumstances the plaintiff would not be entitled to any compensation from the junior road for this right to cross. The act also, as stated above, prescribes the manner of crossing, that is, the crossing shall be at grade. There is, therefore, nothing left for a court to determine in such a case and nothing to condemn. If the junior road should undertake to cross the senior road at a point which would be specially injurious to the senior road, it is possible that a court of equity might require the crossing to be made at a different place, but aside from the place of crossing, we think there is no question involved in the act of crossing under this statute which presents any question for the determination of the court. The cases cited by plaintiff either involved a longitudinal taking of a portion of the senior road's right of way through a canyon or are based upon state statutes entirely different from the act of Congress involved in this case. For instance, the California case cited is based upon the lack of corporate power under the articles of corporation to construct a road at the place of proposed crossing and does not involve the question of necessity of a condemnation of the right of crossing. The Montana case was

based upon a statute of that state and involves the question of the right of a junior road to cross the right of way and completed station grounds of another road without first ascertaining whether it was necessary for the road to cross these station grounds.

In regard to the place of crossing and the necessity of crossing at the particular point selected by the defendant, we think the plaintiff has failed to show that this is an improper place for the defendant to cross, or that there is no necessity for it to cross at this place. The testimony shows that it is absolutely necessary for the defendant company to cross the right of way of the plaintiff at some point near this crossing. The plaintiff's line runs in such course or direction that the defendant cannot build from its terminal to its objective point in the Copper River Valley without crossing the plaintiff's right of way. The testimony also shows that commencing at a point about 800 feet back from the shore line the country becomes mountainous and rugged. In the statement of the case we have pointed out the advantages of the line of defendant as projected as compared with the disadvantages of the line passing around through these hills back of the terminal tract. We have shown that the cost of construction of the latter line would be very much greater than that of the first and the cost of operation would be practically double, and that the efficiency of the road, that is, its tonnage-

carrying ability on the line as projected would be more than double for each locomotive the carrying ability upon the other line around the terminal tract. These facts of course would all enter into the charges for transportation and would necessitate a freight charge from Katalla to the copper fields upon the line around the terminal tract of double the charge which would be reasonable upon the other route, and would thereby hamper and retard the development of the interior of the country. The purpose of Congress in granting free rights of way to railroad companies was to aid in the development of the country. The manifest purpose of the canyon and defile clause and of the clause prohibiting the senior road from preventing a junior road from crossing its right of way was to prevent the senior road from seizing upon strategical points in the country and thereby excluding other railroads from access to the interior. Inasmuch as the defendant company has a right to cross the right of way of the plaintiff at some point, provided it crosses at grade, and as the testimony shows in this case that the point selected is the proper place for crossing, we respectfully submit that there is no necessity for going through the form of either a condemnation or securing an order from the court fixing the place and manner of crossing.

Even if the court should be of the opinion that it would be proper for a junior road to secure an order

of the court fixing the place of crossing under this act, we contend that it does not follow that the plaintiff is entitled to an interlocutory injunction. The facts demonstrate that upon such a hearing the court would permit the defendant to cross at the place it has selected and in the manner it is crossing, that is at grade. In such case it is usual for the court, instead of granting an injunction, to enter a judgment to the effect that the defendant will be enjoined unless within a given time it commences proper proceedings to condemn the right of way.

Such a decree, however, could not be entered until the final hearing.

We insist, however, that the plaintiff has no such title to either the right of way or the station grounds as entitles it to the decree above indicated.

VI.

We do not deem it necessary to reply at any great length to the argument of the plaintiff tending to show a defective organization of the defendant company. It is true that the defendant company had not filed its amended articles of incorporation with the Secretary of the District of Alaska. The same fact, however, is true of the plaintiff company. It is also true that the original articles of incorporation of the defendant company

did not mention Katalla as the terminus of its main line. The same is true of the plaintiff company. These original articles of the defendant company, however, did authorize it to construct "all necessary branches and branch lines, switches, turnouts, roadways, warehouses, depot buildings and other structures, appliances, machinery or equipment that may be necessary or required." The original articles of incorporation were properly filed with the Secretary of the Interior, with the Secretary of the District of Alaska and with the Clerk of the District Court at Valdez. The company had also complied with the provisions of Chapter 23, Title 3, act of June 6, 1900, providing a civil code for Alaska, and was authorized to do business in Alaska. It therefore had corporate power under its original articles to build a branch line of road from Katalla to the copper fields. The construction of such a road was legitimately within the corporate powers of the company under its original articles.

Whether amended articles of the defendant company had been filed with the Secretary of the Interior does not appear in this record. The map of the preliminary route of the company was filed with the Secretary of the Interior and was accepted by him for filing under provisions of the act of May 14, 1898, on the 26th day of January, 1907,—the legitimate presumption must be that in accepting these articles the land depart-

ment found that the company had complied with the provisions of this act and was entitled to its benefits. Whether a company which has executed original articles of incorporation and in every respect complied with the civil code of Alaska authorizing foreign corporations to do business in that district, is also required to file with the officers of the District of Alaska copies of any amended articles it may subsequently execute has not been decided by any court so far as we are advised. We think it would be necessary to file copies of the amended articles with the Secretary of the Interior if the original articles were not such as to authorize the company to claim the benefits of the act of 1898. The original articles of the defendant company which were filed with the proper officers in Alaska, accompanied by the financial statement required by law, authorize that company to do business in Alaska. Under these articles it had the corporate power to build branch lines of railroad wherever it deemed necessary, and it had corporate power to buy and own real estate. Under those powers it cannot be successfully claimed that the act of the company in acquiring by purchase a strip of ground 200 feet in width across the disputed tract was *ultra vires* the corporation. Its acquisition of the title to this ground by purchase was therefore legal, irrespective of the question whether it was entitled to any of the benefits of the act of May 14, 1898, without filing its amended

articles with the proper office in Alaska, or not. The plaintiff, however, is in a somewhat different position, because it had never filed copies of its amended articles with the proper officers in Alaska, and based its entire claim to the premises in controversy upon the act of May 14, 1898.

VII.

We observe in the record that the plaintiff has caused to be printed therein a document called Supplemental Complaint, which appears to have been served and filed with the Clerk of the District Court on the 26th of July, 1907. This case was tried before the district court on the 8th of June, and the judgment from which the appeal was taken was entered on the 12th of June, 1907. The petition for an appeal is dated on the 18th of July, and was allowed by the District Judge on the 25th of July. The order allowing the appeal and fixing the bond was also allowed on the 25th day of July, and the bond for the appeal was approved on the 25th of July. This alleged supplemental complaint was filed after the appeal was taken and after the trial court had lost jurisdiction of the case. The defendant of course has had no opportunity to answer the charges made in this supplemental complaint, and it must be obvious that this document was injected into this record for some reason other than any desire to present to this court the record upon which the issues in the court below were determined.

So far as the matter set up in the supplemental complaint is concerned, we will be prepared to meet the allegations at the proper time and have no doubt of our ability to show them to be utterly unfounded. We call attention to this document improperly inserted in this record for the reason that it was apparently injected for the purpose of prejudicing the court against the defendants. The learned counsel who prepared the brief in this case, and under whose direction we assume this document was printed in this record, must know that this court will not consider upon this hearing any matters that were not before the trial judge in the court below, and particularly will not be influenced by prejudicial statements improperly injected into the record without an opportunity upon the part of the defendant to answer them.

We note that the plaintiff's counsel have stated in their brief (p. 72) that it appears from the record that since the institution of this action three physical encounters have been had in order to procure a crossing on the ground in controversy. We presume the record they refer to is the document above mentioned, and it is a legitimate inference that this document was inserted in the record in order to give the counsel an excuse or a pretext for making such a statement.

The transcript in this case, consisting of 72 printed

pages, was served on us on August 30th, 1907. We mention this fact as an excuse for the imperfect manner in which we have presented the case of the defendants. Seven days is a short time within which to prepare and print a brief covering such a large record and so many questions. We submit the cause, however imperfectly presented, in the confident belief that an examination of the record will convince the court of the justice and correctness of the views expressed by the learned judge upon the trial below.

Respectfully submitted,

W. H. BOGLE,
WINN & BURTON,
CHARLES P. SPOONER,
Attorneys for Defendants.